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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 GOPAL BURGHER and SCOTT JAFFE,

4 Defendants,

5 v.

12 CV 4042 (JKG) (WHP)

6 B. SETH BRYANT,

7 Defendant.

8 -----x

New York, N.Y.

9 May 22, 2012

5:00 p.m.

10 Before:

11 HON. JOHN G. KOELTL,

12 District Judge

13 APPEARANCES

14 JOSHUA FINGOLD, ESQ.

15 TERESA ROSEN PEACOCKE, ESQ.

Attorneys for Plaintiffs

16 PILLSBURY WINTHROP SHAW & PITTMAN, LLP.

17 Attorneys for Defendant

18 BY: TIMOTHY M. RUSSO

C5m6gopc

(Case called; in open court)

THE DEPUTY CLERK: All parties please state who they are for the record, starting with counsel who is appearing by telephone.

MR. RUSSO: Good afternoon. This is Tim Russo for defendant with Pillsbury Winthrop Shaw Pittman, LLP.

MR. FINGOLD: Joshua Fingold. I am counsel for the plaintiffs, Scott Jaffe and Gopal Burgher.

MS. PEACOCKE: Teresa Peacocke, counsel for the plaintiffs. Mr. Gopal Burgher and Mr. Scott Jaffe.

THE COURT: Mr. Russo, could you please not be typing because that comes through on the telephone.

MR. RUSSO: I apologize, your Honor. I was raising the volume. I was having a hard time hearing people speaking.

THE COURT: We'll try to keep our voice up. If you don't hear us at any time, just tell us to raise our voices.

MR. RUSSO: Understood.

THE COURT: I have an order to show cause with a temporary restraining order so I will listen to the plaintiff. It is plain that I am hearing this as the Part I judge. I will in any event set it down I expect Judge Pauley before whom the case is pending. The real issues are whether there should be a temporary restraining order and what an appropriate time to set the matter down before Judge Pauley is.

So plaintiffs.

C5m6gopc

1 MR. FINGOLD: Yes, your Honor. On behalf of the  
2 plaintiff we would respectfully ask you to grant the temporary  
3 restraining order. Your Honor, this is a classic freeze-out of  
4 a partnership. My two clients combined to own 56 percent of  
5 the interest. The defendant owns approximately 40 percent of  
6 the interest and what he has done is taken a unilateral action  
7 without proper authorization in violation of the partnership  
8 agreement and without a proper quorum to lock one of my clients  
9 out of the office and turn off his e-mails as a result of which  
10 my client cannot work on the matters of the firm. The other  
11 client he has removed from the executive committee and from the  
12 bank account and on information and belief he is draining that  
13 account to pay for his own defense in this matter.

14 We would respectfully ask you to return the parties to  
15 the status quo before this improper unilateral action and in  
16 doing so we can prevent further harm and we have substantial  
17 likelihood of success on the merits so it would be appropriate.

18 THE COURT: You are going to have to give me more  
19 information than that. In your papers you indicate that you  
20 want the matter returned to the status quo prior to  
21 February 27, 2002.

22 MR. FINGOLD: 2012, Judge.

23 THE COURT: I am sorry. 2012.

24 MR. FINGOLD: Yes, Judge. In February 2012 the  
25 defendant in this case took a unilateral action of creating a

C5m6gopc

1 written consent, which we call it Bryant document since he was  
2 the judge, jury, prosecution, accuser and executioner and  
3 decided to change the partnership agreement such that Mr. Jaffe  
4 is no longer a partner and Mr. Burgher is no longer on the  
5 executive committee. He sat on that document for four months,  
6 took no action with it and then in the last several days he  
7 locked the doors and Mr. Jaffe has not been able to get into  
8 the office to work on his client matters. The clients have  
9 been calling the firm to ask for the matters to be transferred  
10 to Mr. Jaffe because they are time-sensitive.

11 All the people here are professionals. They are all  
12 attorneys. The defendant sat on this for months while he knew  
13 it was a disputed matter and rather than take it to a court as  
14 he should have, he just in the dead of night locked the doors.  
15 As a result of this action, the clients of my client are being  
16 harmed, and we would ask you to put it back in a position so  
17 that he can continue to work on their matters and that there  
18 will be no harm to them.

19 Additionally, my client's reputation is being  
20 destroyed because the defendant is sending out notices to  
21 anyone who sends an e-mail to him that he basically has been  
22 fired from the firm. As a result of this, it would cause no  
23 harm to the defendant to undue this and bring it back to how it  
24 was two weeks ago, but it causes impossible and irreparable  
25 harm every single minute that this current situation goes on,

C5m6gopc

1 your Honor.

2 THE COURT: I don't understand. You say that the  
3 unilateral action was taken on February 27th, 2012 but the  
4 defendant sat on it?

5 MR. FINGOLD: Yes, your Honor. The defendant wrote up  
6 a so-called written consent whereby he decided as the only  
7 voting partner of significance that Mr. Jaffe no longer  
8 deserves to be a partner in this firm and Mr. Burgher no longer  
9 deserves to be on the executive committee. That was contested.  
10 The plaintiffs had been going back and forth about how to do  
11 that and see if they could negotiate a settlement and the  
12 defendant stonewalled them. Nothing happened. He made various  
13 indications at different times that he was going to bring the  
14 matter to various forums and again nothing happened. And then  
15 last week my clients attempted to get into the building and at  
16 one point they were both denied. Eventually Mr. Burgher was  
17 allowed back in, but Mr. Jaffe still cannot access his e-mails.  
18 He still does not have the resources of the firm. He does not  
19 have his client files. The clients, he works on several  
20 corporate matters with time-sensitive documents. He receives  
21 stock certificates for trust funds and hedge funds and they  
22 need to be acted on. It is causing irreparable harm by my  
23 client not having access to the building, to the e-mail, by not  
24 being on the web page, his reputation is being destroyed. This  
25 e-mail response that the defendant has set up is making people

C5m6gopc

1 think that he has been fired when in fact he is a partner of  
2 the firm. It is one of the exhibits to both affidavits in  
3 support of our application.

4 With reference to Mr. Burgher, the bank account is  
5 being used to pay for defense counsel and we would respectfully  
6 ask your Honor this could be easily prevented just for a few  
7 days until we have the opportunity to come before the assigned  
8 justice and make an application for preliminary injunction,  
9 which would be on full written papers with proper notice to  
10 both parties.

11 THE COURT: Mr. Russo.

12 MR. RUSSO: Thank you, your Honor. I just want to  
13 start by saying this a case with a claim of one million dollars  
14 of money damages only. It is also by plaintiffs' own admission  
15 a case that concerns a partnership agreement, which is subject  
16 to arbitration. So defense party moved to federal court and  
17 then probably filed a motion to compel arbitration in the  
18 matter.

19 THE COURT: Hold on. Hold on. You have got to take a  
20 break every now and then because otherwise I can't interpose a  
21 question just in which the way the phone system works.

22 MR. RUSSO: I apologize, your Honor.

23 THE COURT: That's okay. You mentioned being removed  
24 to federal court. The case is brought in federal court I  
25 thought. That is where we are. Am I right?

C5m6gopc

1 MR. FINGOLD: No, Judge. It was brought in state  
2 court and removed to federal court, your Honor.

3 THE COURT: So, Mr. Russo, you removed it?

4 MR. RUSSO: Yes, your Honor. We removed it this  
5 afternoon with hopes that we could probably move to compel  
6 arbitration. In our experience in state court TROs and  
7 preliminary injunctions usually take longer to get decided as  
8 well as motions and we thought it most appropriate to move to  
9 federal court with the hope that we can get an more expeditious  
10 decision allowing arbitration to proceed under the partnership  
11 agreement.

12 THE COURT: What is the basis for federal  
13 jurisdiction?

14 MR. RUSSO: Diversity, your Honor. The defendant is a  
15 New Jersey resident and both plaintiffs are New York residents.  
16 One I understand is from Suffolk County on Long Island and the  
17 other is a resident of New York County.

18 THE COURT: It is citizenship, not residence. But is  
19 it right that Mr. Bryant is a citizen of New Jersey and that  
20 both --

21 MR. RUSSO: Yes.

22 THE COURT: -- both plaintiffs are citizens of New  
23 York?

24 MR. RUSSO: Yes, it is, your Honor.

25 THE COURT: That does not appear to be contested.

C5m6gopc

1           Next question. Let me just ask the plaintiffs is it  
2           right that the only release sought in the complaint is damages?

3           MR. FINGOLD: That is not correct, your Honor. We are  
4           also asking for injunctive relief of restoration of both  
5           partners to their full partnership interest and also to both  
6           partners being on the executive committee where they were prior  
7           to the unilateral action in the Bryant document.

8           Additionally, your Honor, we are asking for the Court  
9           to declare that any unilateral actions taken by Mr. Bryant  
10          while my partners have been frozen out to be null and void.

11          THE COURT: Mr. Russo, included with the papers is a  
12          complaint with a caption for the Southern District of New York.  
13          Was the case begun in state court with a summons without a  
14          complaint?

15          MR. FINGOLD: Do you want me to answer, Judge?

16          THE COURT: Yes.

17          MR. FINGOLD: Yes, Judge. The complaint was begun in  
18          Manhattan Supreme Court with papers indicating a caption of  
19          Manhattan Supreme Court. When we got the removal notice, we  
20          came to the ex parte office here and asked for assistance and  
21          they told us we had to redo the papers with a Southern District  
22          caption. We ran to Kinko's and in effect made that change.

23          THE COURT: Mr. Russo, even if you're right that the  
24          matter should proceed in arbitration -- by the way, let me ask  
25          the plaintiffs, there is an arbitration clause in the



C5m6gopc

1 partnership agreement?

2 MR. FINGOLD: There is an arbitration clause.  
3 However, we dispute that it applies to these types of  
4 situations. The arbitration clause applies to the amounts of  
5 the accounting at the end of the partnership. And also I would  
6 note, your Honor, that the defendant in this case took actions  
7 and if he thought there was an arbitration clause, he himself  
8 should have submitted his disputed actions to arbitration. He  
9 sat on it for four months and then locked the doors in the  
10 middle of the night one day and now he is trying to hide behind  
11 an arbitration clause and we would respectfully ask you to  
12 apply these provisional remedies even if the arbitration clause  
13 were to be valid.

14 THE COURT: Mr. Russo, go ahead.

15 MR. RUSSO: Yes, your Honor. The resolution clause in  
16 the partnership agreement is very broad. It says that it  
17 applies in any controversy, claim or dispute between the  
18 parties arising or relating to this agreement, referring to the  
19 partnership agreement of course. There is a provision  
20 regarding resolving problems with the executive committee. The  
21 next step is actually to bring arbitration, which plaintiffs  
22 have not done in this case. Plaintiffs haven't served a  
23 complaint on my client for the record.

24 What they are asking for here would harm an ongoing  
25 business. As you noted, this has been going on since February.

C5m6gopc

1 Emergency relief is not appropriate now after many months have  
2 passed. Access to partnership bank accounts or anything else,  
3 a partnership which they are no longer a part of would be  
4 inappropriate and would cause harm to the partnership as a  
5 whole, not only my client who happens to be a managing partner  
6 but the business entity that they have an issue with. So for  
7 that reason alone we think the TRO they are requesting would be  
8 completely inappropriate at this time.

9 THE COURT: Oh, I need more than rhetoric on both  
10 sides frankly. You can get provisional relief in court pending  
11 arbitration. So the fact that there is an arbitration clause  
12 is not dispositive whether there should be provisional relief.

13 It is troubling that the parties have been talking  
14 about this or that the plaintiffs had knowledge of this since  
15 February, February 27th. On the other hand, it is troubling  
16 that the plaintiffs come in and say that the defendant has now  
17 escalated matters within the last couple of days blocking one  
18 of the plaintiffs out of the office and making public  
19 statements that the plaintiffs are no longer associated with  
20 the firm. That's an escalation. Whether it's enough to get a  
21 temporary restraining order is a question. It doesn't advance  
22 the ball a lot for the defendant to say that there will be lots  
23 of people irreparable harmed if the TRO is granted without any  
24 meat on those bones. I don't accept the conclusory statements  
25 by either side. Let me ask a couple other questions and then

C5m6gopc

1 you can speak to these issues more.

2 One question that comes up, Mr. Russo, is what is it  
3 that has occurred recently that would cause the escalation of  
4 locking one of the partners, former partners you would say, out  
5 and announcing to the world that the person is no longer a  
6 partner and why is it that the parties could not reach some  
7 form of standstill agreement between them until the judge could  
8 hear a preliminary injunction as to whether in fact there  
9 should be an injunction pending the outcome of the arbitration  
10 or not?

11 There would seem to be a couple easily resolvable  
12 issues such as the use of the bank account. Also, there is the  
13 issue of if the defendant was prepared to live with the two  
14 plaintiffs since February, three months, what is it that would  
15 cause the defendant not to be able to live with the plaintiffs  
16 for another two weeks until the preliminary injunction could be  
17 heard?

18 Mr. Russo, the ball is in your court.

19 MR. RUSSO: Thank you, your Honor. To be perfectly  
20 frank, I don't have all of the facts in this case as we just  
21 received this complaint last night.

22 THE COURT: Okay. You had told me that your client  
23 had not been served with the complaint but you have had the  
24 complaint overnight. You really should have told me earlier  
25 that you had the complaint overnight before telling me that

C5m6gopc

1 your client hasn't been formerly served, but go ahead.

2 MR. RUSSO: Your Honor, I didn't intend to be  
3 misleading in any way. I was simply saying that there has been  
4 no service in the case. We received this last night as a  
5 threat that it was going be filed today or overnight and we  
6 received copies of it via county filing in New York State court  
7 this morning. I don't have the facts about what recently  
8 transpired that caused things to change from his perspective.  
9 So I would like to answer your Honor's questions at this time,  
10 but I am simply unable to at this time.

11 THE COURT: What is the nature of the firm that we're  
12 dealing with, investment banking of some sort?

13 MR. FINGOLD: Law firm, your Honor.

14 THE COURT: Law firm.

15 MR. FINGOLD: Your Honor, I would also note that I  
16 personally spoke to the defendant on Friday night and offered  
17 to meet him to give him copies of papers. He refused to meet  
18 me. I e-mailed him the papers and I also e-mailed them to  
19 Mr. Crichlow of Mr. Russo's firm on Friday evening. We waited  
20 for contact to see if they would be in response to us. They  
21 didn't. I e-mailed him another set of papers last night, the  
22 ones that had actually been filed with Manhattan Supreme Court.  
23 And then we saw the defendant down at the courthouse this  
24 morning and in just literally moments before we were going to  
25 appear before a judgment of the Manhattan Supreme Court, we got

C5m6gopc

1 the removal papers to District Court. The defense has known  
2 about in for several days. They have known about this for  
3 several months and they just locked the doors last week.

4 THE COURT: When last week?

5 MR. FINGOLD: I believe it was May 8th, Judge.

6 THE COURT: By my calendar that is not last week.

7 MR. FINGOLD: I apologize, Judge.

8 THE COURT: That's 14 days. That's two weeks.

9 MS. PEACOCKE: Just to clarify, your Honor, that this  
10 precipitous action on the 8th of May, we sought so resolve it.  
11 It was resolved in favor of Mr. Burgher, but not in favor of  
12 Mr. Jaffe.

13 MR. FINGOLD: It is still not completely in favor of  
14 Mr. Burgher because Mr. Burgher cannot see the money being  
15 drained from the bank account to pay for the defense counsel  
16 who is on the phone right now.

17 THE COURT: Draining the money from the bank account  
18 for a law firm is not the kind of irreparable injury that you  
19 would normally think about that would justify a temporary  
20 restraining order. If the money comes out and it shouldn't  
21 come out, it can go back in.

22 MR. FINGOLD: Yes, Judge.

23 THE COURT: That is classically not a basis for a TRO.  
24 Counsel for the defendant should be cautious about receiving  
25 funds that may be determined shouldn't be paid.

C5m6gopc

1 Right, Mr. Russo?

2 MR. RUSSO: Yes, your Honor. We are so new to this  
3 case as far as I am aware that I don't think we have actually  
4 invoiced the firm to date. So any allegation that the firm is  
5 draining funds of the partnership at issue here, I don't think  
6 there is a basis for that. I can understand the concern by a  
7 party. I am an associate so I don't send bills for my firm,  
8 but that is something that hasn't happened to date.

9 THE COURT: You are very good and responsive. Is  
10 there a partner working on the case?

11 MR. RUSSO: There is, your Honor. Mr. Crichlow whom I  
12 referred earlier is flying to Houston right now.

13 THE COURT: Well, that is not a real response. I am  
14 sure it is a truthful response; it is just not a sufficient  
15 response. If you had enough information about the case to file  
16 the removal papers, we would have hoped that you had enough  
17 information to respond to the motion.

18 MR. RUSSO: Your Honor, I apologize that I don't have  
19 more information at this time. We obviously did not anticipate  
20 we would be responding to a motion in federal court on the same  
21 day of the removal.

22 THE COURT: Here is what I will do: I will hear all  
23 of you tomorrow at 2:30 and that will give time for the  
24 defendant to gather the information to respond. We're just  
25 talking about the TRO really. I am not going to issue the TRO

C5m6gopc

1 now, but I will listen to any arguments that the parties have  
2 in favor of or in opposition to the TRO tomorrow at 2:30 p.m.  
3 and the defendant should submit something in writing if the  
4 defendant opposes the TRO by tomorrow at noon.

5 Mr. Russo, you should be in contact with Mr. Crichlow  
6 and if Mr. Crichlow wants to appear tomorrow at 2:30 p.m. by  
7 phone, that would be fine. If he wants another one of his  
8 partners to be here at 2:30 p.m., that is fine. If you are  
9 going to carry the ball completely, that's fine by me. I am  
10 not requiring this but anything else the parties want to submit  
11 to me in support of or in opposition to the TRO should be  
12 submitted to me by noon tomorrow. And second, the parties  
13 should ask themselves overnight -- I mean you are all lawyers.  
14 The clients are lawyers -- whether some form of living  
15 arrangement can be worked out between now and the time when  
16 Judge Pauley can hear you on the preliminary injunction.

17 I appreciate in dealing with a law firm there are  
18 issues including ongoing clients and are those clients of the  
19 individual lawyers or are they clients of the firm, what is the  
20 basis for the alleged dissolution of the partnership or the  
21 ousting of an individual partner or partners. So papers  
22 tomorrow by noon. I expect the parties to have discussed this  
23 and to have discussed whether a living arrangement can be  
24 worked out between now and the time of the hearing on the  
25 preliminary injunction, which I expect will be early June,

C5m6gopc

1 probably Monday, June the 4th. I will hear all of you tomorrow  
2 at 2:30 p.m.

3 Yes.

4 MS. PEACOCKE: Your Honor, just so ask in case the  
5 parties are able to work out some sort of living arrangements,  
6 can we communicate that to you other than by an appearance?

7 THE COURT: Yes. You can send me a fax at  
8 212-805-7912.

9 MS. PEACOCKE: Thank you very much.

10 MR. FINGOLD: Also, your Honor, the I papers  
11 themselves, do you want it them delivered to you via ECF or  
12 hard copy to chambers.

13 THE COURT: Hard copies to chambers is best. You can  
14 put them on ECF so you can communicate with everyone else that  
15 way. Hard copy to my chambers. Courtesy copy is best. And  
16 you can try if the papers are not too long to try to fax them  
17 to me.

18 Anything else?

19 MR. RUSSO: Nothing from me, your Honor. Thank you.

20 MR. FINGOLD: Nothing, your Honor, from the  
21 plaintiffs.

22 MS. PEACOCKE: Your Honor, thank you.

23 THE COURT: Good to talk to you all. Good evening  
24 all.

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